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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

In the Matter of NOTICE OF PROPOSED RULEMAKING CONCERNING PASSENGER MANIFEST INFORMATION (NOTICE 96-23)	Docket No. OST-95-950 -50

COMMENTS OF
THE ORIENT AIRLINES ASSOCIATION

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A. Introduction

These Comments to the Notice of Proposed Rulemaking Order OST-95-950 regarding Passenger Manifest Information are being submitted on behalf of the Orient Airlines Association (OAA). The members of the OAA strongly object to the proposal that certain prescribed information be obtained for passengers boarding flights to and from the United States insofar as the requirement, if placed on foreign air carriers, will be unduly costly, time-consuming, and may not necessarily accomplish the desired end result of timely notification of victim's families in the event of a catastrophic airline disaster. In addition, the requirement will interfere with preventative security measures at airports.

B. The Orient Airlines Association

The OAA is the trade association of 16 major airlines based in the Asia-Pacific region, founded in 1966 to provide a forum

for examining international air transport issues and for developing action plans on matters of mutual concern. Its members include Air New Zealand, Air Niugini, All Nippon Airways, Asiana Airlines, Cathay Pacific Airways, China Airlines, EVA Air, Garuda Indonesia, Japan Airlines, Korean Air, Malaysia Airlines, Philippine Airlines, Qantas Airways, Royal Brunei Airlines, Singapore Airlines and Thai Airways International.

C. Summary of Argument

The OAA argues that the proposed requirement to collect passenger manifest information raises major issues with respect to inappropriate unilateral regulatory action on the part of the United States and is in conflict with established international practice and agreements. The requirement also imposes unreasonable and unfair costs on foreign air carriers and their passengers. The rule has no relationship whatsoever with the Security Act's fundamental objective of improving the security of international air services and, air services in general, but simply addresses the obligation of the U.S. Department of State under U.S. law; for if it did, there would be no rationale for excluding U.S. domestic services from its coverage. Finally, the laws of foreign countries apply to foreign air carriers and, assuming the referenced Memorandum of Understanding would deal with potential conflicts, its role as an "alternative" must be more fully delineated and explored before DOT applies these draconian passenger manifest measures to foreign air carriers.

D. Background

This proceeding was instituted pursuant to the requirements of the Aviation Improvement Act of 1990 [Public Law 101-604], hereinafter referred to as the "Security Act." Section 203 (a) of the Security Act directs the Secretary of Transportation to promulgate regulations requiring all U.S. air carriers to provide a passenger manifest to the Department of State for any flight that has been involved in an aviation disaster outside of the United States. The Secretary is directed to "consider" a comparable requirement for foreign air carriers. The manifest must contain each passenger's name, passport number (where a passport is required for travel), and the name and telephone number of a contact person for each passenger. The manifest must be provided to the State Department within one hour of being notified of the disaster, or as expeditiously as possible, but no later than three hours after receiving such notification.

On January 31, 1991, DOT issued an Advanced Notice of Proposed Rulemaking (ANPRM) and solicited public comment on, among other things: the methods which should be adopted for facilitating the collection of the required passenger information; whether the information should be collected for all passengers or just U.S. citizens; whether flights between two foreign points should be covered by the reporting requirements; whether foreign airlines serving U.S. markets should be required to comply; and, whether the requirements should apply to domestic flights. The OAA submitted comments on February 28, 1991 as part of a joint filing with Air Canada, Air Jamaica, Balair, and Condor Flugdienst GmbH.

In September 10, 1996, a Notice of Proposed Rulemaking (NPRM) was printed in the Federal Register. This NPRM requires

that U.S. and foreign air carriers collect passenger manifest information including the passenger's full name and passport number and issuing country code if a passport is required for travel, and a name and telephone number of a person or entity to be contacted in case of emergency for U.S. citizens and lawful permanent residents of the United States on flight segments to or from the United States.

Regrettably, with the exception of the affirmative exclusion of flight segments entirely outside of the United States and of foreign citizens, the NPRM has not taken notice of the unanimous objection to the ANPRM of the foreign air carrier community. Therefore, this filing in strong objection to the DOT proposal is necessary once again.

E. Argument

1. The Proposed Requirement Raises Issue of Unilateral Action in Conflict with Established International Practice and Agreements

The Security Act directs the Secretary of Transportation to consider imposing a passenger manifest requirement on foreign air carriers. [49 USC Sec. 44909 (b)]. If established international practice and agreements in the field of aviation security is given proper weight during this consideration, DOT must conclude that passenger manifest requirements *of any sort* should be negotiated either directly with foreign governments or through the International Civil Aviation Organization (ICAO) rather than imposed by unilateral action.

It is notable that the Security Act states that Secretary of Transportation merely consider imposing a requirement on foreign air carriers. However, an earlier section in the same Act

directs the Secretary of State to use negotiations and ICAO to achieve the same end:

> .....The Secretary of State is directed to enter, expeditiously, into negotiations for bilateral and multilateral agreements ---
> (A) for enhanced aviation security objectives;
> (B) to implement the Foreign Airport Security Act and the foreign airport assessment program to the fullest extent practicable; and
> (C) to achieve improved availability of passenger manifest information.
>
> (2) A principal objective of bilateral and multilateral negotiations with foreign governments and the International Civil Aviation Organization shall be improved availability of passenger manifest information. [Section 201 (b). Emphasis added].

This is an important differentiation which clearly demonstrates the sensitivity of the framers of the Security Act to international protocol with respect to security matters and the means by which the United States government should undertake the implementation of *any* passenger manifest information requirement.

The Convention on International Civil Aviation (the "Chicago Convention") was developed specifically for the purpose of establishing common rules and practices for international aviation and governs the actions of member states as they affect international aviation. The concluding paragraph to the Preamble states:

> ....the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically;
>
> Have accordingly concluded this Convention to that end.

Chapter IV, Article 26 of the Convention confers the obligation to investigate an aviation disaster on the State in which an accident occurs, and provides a more limited role for the State in which the aircraft was registered. As written, Section 203 (a) of the Security Act would come into effect if the airline disaster occurs outside the United States. Under these conditions, the precise role and requirements of the U.S. government should be defined only after intergovernmental discussions have taken place and with the agreement of foreign governments.

The United States recognized the necessity to present and discuss its revised security provisions with foreign governments when it commenced its efforts to revise the security article of bilateral agreements. If it intends to impose passenger manifest information requirements on foreign carriers --- and the rationale for doing so is doubtful --- then it should use the same avenue rather than ignore accepted rules of comity and reciprocity.

Finally, DOT acknowledges that application of the proposed rule to "U.S. citizens on all international flight segments might raise troublesome issues of extraterritorial application of United States law for flights originating and terminating at foreign points." [Preliminary Regulatory Evaluation, September 10, 1996, p.9.] While fully supporting the DOT's decision not to apply the rule to these flight segments, or to all flight segments of a single-number flight, the OAA believes that the same reasoning should apply to the application of the rule to *any* foreign air carrier even when the origin or destination of the flight segment is in the United States.

In sum, the proposed action by DOT flies in the face of both Congressional direction and the Chicago Convention. It does not follow established principles for regulating international transportation.

2. The Proposed Requirement Imposes an Unreasonable and Unfair Burden of Costs on Foreign Air Carriers and their Passengers

Responses to the ANPRM show that U.S. and foreign air carriers agreed without exception that implementing passenger information collection as proposed will be costly both in terms of dollars spent and time dedicated to the task. As acknowledged by DOT in its Preliminary Regulatory Evaluation, significant costs will be incurred for redesign of automated check-in and reservations systems to provide the means of entering and maintaining the additional passenger information. Personnel must be trained by air carriers and travel agents so that they will know how to solicit the information and deal with cases when the passenger refuses to cooperate. Equipment will need to be purchased and installed in order to accommodate what are certain to be greater demands at passenger check-in. It is highly likely that more check-in counters will be needed. To the extent that passengers will have to provide the information to reservations agents and at check-in, there will be costs associated with delays in terms of passenger time and even in aircraft departure.

Even if one accepts costs as estimated in the Preliminary Regulatory Evaluation -- and the OAA believes they are conservatively estimated -- they are a substantial burden on foreign air carriers. This is particularly bothersome given that air carriers have, or should have, alternative and better means

of dealing with the problem being addressed by this NPRM and which would cover all passengers in the event of an aircraft disaster. For example, an emergency response program which relies on concerned individuals, families and friends to call into a properly manned telephone number, followed by assiduous airline checks and counter-checks, could be as efficient a means of notifying relatives and friends of the names of passengers on board while avoiding the potential for error, the high costs, and the possibility of diminished security that would result in the approach selected by the DOT. Evaluating existing safety and security procedures for adequacy is a reasonable undertaking by the United States regulatory agencies. Imposing totally different and burdensome ones is not.

A number of assumptions are raised in the NPRM regarding airline systems and processes available to fulfill the requirements of the proposed rule. These assumptions then support the justification of the feasibility of implementing the performance specification. Among these assumptions are that information can easily be contained in CRSs and that airlines will be able to delegate the collection of such information to travel agents. The OAA carriers have great reservations about their ability to accomplish either of them without enormous cost, if at all.

While most travel agencies in the United States have installed CRSs, the same cannot be said of agencies in the Asia-Pacific region. The distribution system in this region consists of many layers of agents and sub-agents who do not necessarily subscribe to CRSs and who would attempt to collect the information manually. While it may be argued that passengers originating from this part of the world are not classified as

"covered passengers," (that is, U.S. citizens or permanent residents of the United States), and are thus not required to be queried, it is not possible for travel agents to know this, ex ante, without querying the passengers. Even when a passenger produces a non-U.S. passport to show that he is not a U.S. citizen, it is still not possible to determine that he is not a U.S. permanent resident. It is probable that, after all this exchange, the passenger may cancel his travel plan as the commencement of the trip is taking an inauspicious turn. The resulting loss to the airline industry may be substantial and may reduce overall travel to the United States.

It may ultimately be less troublesome not to rely on travel agencies to collect such information for Asia-Pacific originating passengers. It will also soon be realized by the travel agencies that the final checkpoint is at the airport; they will therefore stop any attempt at collecting information. In this case, the responsibility will fall on the airlines at the airport. The same argument regarding difficulty on the part of airlines' reservations office in collecting the information also holds.

At the airport, similar attempts will have to be applied to all passengers. However, under this scenario, the implications are more far-reaching. Attempts to implement the mandate will necessarily mean more processing time. To avoid delayed flights and congestion at check-in counters, an increase in the number of counters would seem to be the answer. But, as pointed out correctly by the Air Transport Association in its comment on the ANPRM, it is more difficult to add more counter space at foreign airports, particularly at Asian airports. This situation negates any efficiency referred to in the NPRM regarding initial opportunities to collect data on outbound flights and retaining

the information in the reservations record. Even if it were possible to add more counters to collect the information into the reservations record, check-in staff will have to access both the reservations record and the departure control record of the passengers, thus adding more processing time to the check-in process.

The collection of passenger manifest information (the cost of which is certain to be significant as posited even by the Preliminary Regulatory Evaluation) is an unfunded mandate and is unfair to foreign carriers insofar as it bears no relationship whatsoever to enhanced aviation security but is simply an inappropriately specific means of satisfying the U.S. Department of State's general obligations under U.S. laws.

3. The Proposed Rule Has No Relationship to Enhancing Security which is the Fundamental Objective of the Aviation Security Improvement Act of 1990.

In its Preliminary Regulatory Evaluation, DOT recognizes that people are unlikely to have their passport number handy when they call an airline or travel agent for a reservation and that the selection of a person or entity to be contacted in case of emergency could reasonably be expected to change from one passenger journey to another. These factors, combined with reticence on the part of passengers to supply the information, are certain to cause substantial delays at the airport. The OAA sees these delays, and the accompanying queues and confusion around check-in counters, to be in direct conflict with objectives of security measures at airports which seek to minimize ground confusion and crowds of people. Indeed, people milling around an airport is precisely what one wishes to avoid

and this would certainly occur as international passengers are required to come to airports to check-in even earlier than they do today and have to wait in lines while the manifest information is collected.

DOT states that delays related to obtaining information at airports are certain to decline over time as 1) people become more accustomed to the practice, 2) agents and airlines retain the information for frequent fliers and only need to verify it at time of reservation or check-in, 3) the Advance Passenger Information System (APIS) procedures and technology proliferate, and 4) the means of checking off people who refuse information is simplified. Such optimism is not shared by OAA carriers. It is highly unlikely that foreign air carriers are able to train a large number of travel agents throughout the world to determine whether or not the passenger for whom a reservation is being made is a U.S. citizen and, then, to collect the required information. Therefore, it is more likely that this information will have to be collected at the airport by foreign carriers. In the meantime, resistance and confusion at airports will reign to the detriment of overall security at airports. And, at the end of this confusion, improvement in the ability to notify next-of-kin will have advanced only slightly insofar as information, if it exists in the manifest at all, could be insufficient or incorrect as veracity of "contact" information cannot be confirmed, causing unnecessary anxiety to the next-of-kin and disruption to the notification process.

Lastly, the proposed requirements will only succeed in diverting airline resources which should be more properly spent on preventive security measures, rather than on some post-

accident notification designed to fulfill the U.S. Department of State's obligations.

4. The Rationale for Collecting Such Information Would Apply to U.S. Domestic Flights

The fundamental rationale for collecting such information, namely, to notify families and friends of victims in the event of a catastrophic crash, would apply equally to U.S. domestic flights. It is incomprehensible why, if the Congress felt it was necessary to require the collection of passenger manifest information for international flights outside of United States territory, it should not also be required for flights within United States territory. If TWA Flight 800 had been an operation solely within the United States, would not notification of next-of-kin have been equally problematic from DOT's point of view? What is the rationale for not including domestic flights? It can only be that Section 203 of the Security Act was a response to immediate crises and unfairly singled out a class of services to impose unreasonable burdens. Extending the application of the NPRM to foreign air carriers while, at the same time, omitting domestic flights from regulatory application, creates doubt in the international community as to the true intent in implementing the law. Therefore, in the interest of comity and reciprocity, the United States should be particularly sensitive to the need to negotiate reasonable provisions to accomplish the same objective with carriers of foreign countries.

5. Laws of Foreign Countries Apply to Foreign Carriers

The Security Act ignores the fact that the laws of foreign countries apply to foreign carriers in the event of an aviation

catastrophe and these laws may conflict with the requirements of the NPRM. For example, a foreign carrier may not be authorized to release any information on its passengers until it has coordinated with the regulatory bodies of its own country or of those in whose territory the event has occurred.

It appears that DOT has thought of this eventuality in its references in the NPRM and accompanying evaluation to a Memorandum of Understanding.[1] However, no information has been given in the NPRM or through other means to foreign air carriers about this "alternative." Perhaps the alternative will address the adequacy of security and notification plans and programs currently in place and obviate the need to collect passenger manifest information as specified in the NPRM. If so, OAA carrier's objections to the NPRM might be lessened. However, foreign carriers cannot respond to the apparently intentionally vague reference to an "alternative" unless DOT provides further information about its intent. Are foreign carriers expected to respond by developing an alternative? If so, why is ICAO not being asked to do so? And, will some additional guidance be provided as to what would constitute an alternative and what would not be considered adequate by DOT and State? And, in the meantime, will foreign carriers be expected to implement the NPRM if they are caught in its net?

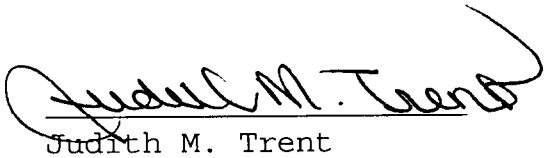
More information is needed about the potential for an "alternative" and a Memorandum of Understanding between governments and carriers and the U.S. State Department.

[1] Alternatively, the rule would provide that DOT may waive compliance with certain requirements of the part if an air carrier or foreign carrier has in effect a signed memorandum of Understanding with the Department of State concerning cooperation and mutual assistance following aviation disasters abroad. [NPRM, Summary and Section 243.21].

F. Conclusion

Regrettably, with respect to U.S. carriers, Congress has constrained DOT's ability to strike a balance between the costs and benefits of trying to make sure that families of those involved in aviation disasters will receive prompt and accurate notification. DOT, however, must not compound this problem by imposing passenger manifest requirements on foreign air carriers. The OAA respectfully requests that the United States: 1) recognize basic principles of comity and reciprocity in international air service regulation and omit foreign air carriers from the scope of its NPRM; 2)negotiate with foreign governments, possibly through ICAO, to achieve its notification objectives; 3) look for alternatives to its costly and time-consuming proposal; and 4) proceed with diligence toward developing and introducing improved technology for identifying passengers as a normal and comprehensive way of dealing with security clearance as well as the accepted requirements of most countries' customs and immigration services. To do otherwise could frustrate international cooperation on aviation security concerns that are shared by all airlines.

Respectfully submitted,



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